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# Supreme Court of the United States

OCTOBER TERM, 1970

## No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem.,
Respondents.

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## PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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*MAY IT PLEASE THE COURT:*

The utter disregard evidenced by our opponents for the law applicable to this case (as well as for the evidence contained in the record) and for the fact that *it presents, directly and squarely, basic legal questions of the utmost importance* - not questions of fact - compels the filing of this reply brief.

Respondents would seek to delude the Court with the idea that this case presents a factual dispute, subject to the "clearly

erroneous" doctrine, and is not in conflict with the other circuits as well as the prior decisions of the Fifth Circuit itself. Nothing could be further from the truth; Chief Judge Brown, a leading practitioner of and authority on collision law prior to his appointment to the bench, stated, in his dissenting opinion:

> "* * * Rule 16 is now dead in the Fifth Circuit. * * * The decision obliterates the two mandatory imperatives of Rule 16 - (1) moderate speed and (2) stopping engines. * * * breaching the moderate speed Rule-of-Sight is a mere technical violation. * * * the court gives its blessing to a vessel plowing right on in the fog toward a ship known to be in its path. * * * (The decision) does not even begin to pay even a deferential bow toward Rule 16, the court's action is nothing more than to write out Rule 16.* * *"

This is what the Fifth Circuit has done with seven members of that court for affirmance and seven members for reversal. *The extent to which this case begs for the granting of a writ by this Court and its reversal to achieve harmony between the circuits, as well as safety of life at sea, makes it entirely unique.*

Respondents urge that the United States Coast Guard is "responsible for making guidelines under the Rules", deliberately misciting a text which states that they "are in part enforced by the Coast Guard, as well as by the private liability system we studied (in another chapter)". It is the height of absurdity to suggest it is not this Court (and the lower Federal courts under its supervision) to which all concerned, including the Coast Guard, must look for guidance in the application and interpretation of the navigational rules; this is precisely what is required here.

I.

**The decision, affirmed by the evenly divided Fifth Circuit, directly conflicts with the Second Circuit decision in the *Goldshell-White Plains*, 224 F. 2d 86, 1955, AMC 1438.**

The Hess brief would seek to support the proposition that the *Goldshell-White Plains* decision - patently applicable here - can be distinguished by the fact that the vessels there were operating in open water rather than in the relatively narrow channel in which the HESS VOYAGER collided with the CHARLES LYKES. This argument is so antithetical to the Inland Rules as to be absurd. Plainly, where navigation is constricted and risk of collision increased thereby, there is the greatest need, not less, for the maintenance of moderate speed and *it cannot be urged that an immoderate speed is made acceptable by the narrowness of the waterway.*

When this argument is considered in the context of the facts existing in this case, it becomes even more incomprehensible. We refer specifically to the admitted fact that *the HESS VOYAGER, in its radar, saw the CHARLES LYKES at a distance of 2 miles* and during the entire time to the point of collision *was aware of the fact that the CHARLES LYKES remained dead ahead and that the vessels were on a collision course.* There was no room for the navigators of the HESS VOYAGER to "presume" or otherwise speculate as to what the CHARLES LYKES was doing, as her counsel would seek to suggest. There was nothing for her to "anticipate" or "foresee": *she actually observed, by radar, that she was on a collision course.* The HESS VOYAGER, accordingly, knew precisely what was being done by the other ship - it was remaining dead ahead where collision inevitably would occur if no steps were

taken by the HESS VOYAGER to avoid that result. *No steps were taken - the collision resulted - inevitably.*

That the requirement of moderate speed in fog under Article 16 of the Inland Rules applies to narrow channels is not subject to question. The statute plainly requires it, by its very terms, and certainly the decisions so hold. *The SYLVIA ARROW & URIAH LUCKENBACH*, 104 F. 2d 102, 1939 AMC 1596 (CA, 2) cert. den. 308 US 603, 84 L. Ed. 501, 60 S. Ct. 140; *The PENNSYLVANIA*, 288 Fed. 666 (CCA, 1, 1922); *The ARMOUR III*, 100 Fed. 667 (D.C., Mass., 1900); *U.S. vs. MS HOYANGER*, 265 F. Supp. 730, 1967 AMC 1047 (D.C., Wash.).

The cases cited to justify her immoderate speed simply do not support - even inferentially - the position of the HESS VOYAGER. The American cases have nothing whatever to do with the point for which they are offered and the English case of *The HARE*, (1904) P. 331, 90 LT 323; 73 LJP 47, 9 Asp. MC 547, dealt only with a local condition. As demonstrated in *The SEDGEPOOL*, (1956) 2 Lloyd's Rep. 668, it is equally a fault to run at immoderate speed in fog in a narrow channel under English law as it is under the law of this country.

*The HESS VOYAGER, moving at 7½ knots through the water, was guilty of grossly immoderate speed.* As stated in *The SITALA*, (1963) 1 W.L.R. 639 (1963) 2 All E.R. 290, (1963) 1 Lloyd's Rep. 205:

> "* * * High speeds at collision cause much greater damage than low speeds. High speeds before collision give less time to appreciate properly the development of the situation. * * *"

Similarly, it was said in *The No. 1*, 161 Fed. 847 (CCA, 2, 1908) that:

> "* * * the important inquiry, notwithstanding that each had come nearly to a stop at the time of collision, is what were their respective speeds before they began trying to keep clear of each other. * * *"

The evidence here is plain: the HESS VOYAGER proceeded at a speed of 7½ knots in fog which gave her a visibility of 300 feet. She did not stop or slow her engine speed at any time prior to the collision although her mate heard the fog signals of the CHARLES LYKES "within the 2 mile area when we were coming together"[1] and she knew the CHARLES LYKES remained dead ahead. *In no manner can this navigation be reconciled with either the statute or the decision of the Second Circuit in the Goldshell-White Plains.*

II.

The decision, affirmed by the evenly divided Fifth Circuit, directly conflicts with the Second Circuit decision in *The Bargan-Bergechief*, 274 F. 2d 469.

Under the *Bargan-Bergechief* decision of the Second Circuit, *radar observation does not constitute ascertainment sufficient to excuse compliance with Article 16.* The Fifth Circuit has held quite the contrary here.

Even more amazing is the fact that such "ascertainment", as was found by the Fifth Circuit to excuse compliance with the

[1] Supp. App. 67. The signals were also heard by her lookout, Supp. App. 257.

fog rules, *was a determination that the CHARLES LYKES was dead ahead and that the vessels were on a collision course.* If this is ascertainment to excuse compliance, the Inland Rules are meaningless or, as said by Chief Judge Brown in his dissent, *"Rule 16 is now dead in the Fifth Circuit"*.

The Rules, themselves, leave no such doubt. Rule 16 provides that in fog, after stopping her engines, the vessel shall "then navigate with caution until danger of collision is over". The latter is defined, 33 USCA 201:

> "Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

When the bearing remains dead ahead, without any change whatever, there can be no doubt, in anyone's mind, as to the very obvious risk (indeed certainty) of collision.

The "ascertainment" required by the Rule cannot be a determination that a vessel is dead ahead and that collision is a certainty. As stated in *Nippon Yusen Kaisha vs. The China Navigation Company, Ltd.*, (1935) A.C. 177, 104 LJP 634, 152 LT 313, 51 TLR 205, 78 SJ 897, 18 Asp. M.C. 533, 50 Ll. L. Rep. 155, P.C.:

> "* * * In order that the position of a vessel may be ascertained by another vessel within the meaning of the regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision. * * *"

This is precisely what the HESS VOYAGER knew.

positively and affirmatively, could not be accomplished, yet she continued to proceed - *at immoderate speed and without stopping her engines* - and thereby made collision inevitable.

## III.

## Conclusion.

Hess would convey to the Court the thought that a tanker in ballast is an inert object, apart from the fact that the HESS VOYAGER represented a mass of more than 27,000 tons moving at a speed of 760 feet per minute. If this were not sufficiently devastating when presented in a collision situation, we need only point out that tankers in ballast have been held to be "as potentially dangerous as a live bomb", *ELVI II-MISSION SAN FRANCISCO*, 183 F. Supp. 129, 1961 AMC 1887 (D.C.,Del.).

The issues presented here are entirely basic, whether or not a large tanker can proceed, with impunity, in a dense fog at a speed of 7½ knots with knowledge that another vessel lies dead ahead. If, under any circumstances, navigation of this character is permitted by the Rules and by the decisions of the courts, the purpose both of the Rules and of the courts has been defeated.

The Fifth Circuit, standing seven judges for affirmance and seven judges for reversal, plainly requires guidance, navigators faced with the conflict between the Fifth Circuit and the Second Circuit equally require guidance. This is the only forum from which recourse may be had and it is essential that this

Court act to remove the doubts created by this most unfortunate decision.

Respectfully submitted,

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PILLANS, REAMS, TAPPAN, WOOD & ROBERTS.

**Certificate.**

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing reply brief on respondents' counsel of record, T. K. Jackson, Esq., by mailing a copy thereof, postage prepaid, to him at his office at Mobile, Alabama, on this . . . . day of August, 1970.

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BENJAMIN W. YANCEY.